No. 03-1500

In The
Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF FRATERNAL ORDER OF EAGLES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF THE ARGUMENT	5
ARGUMENT	6
I. INTRODUCTION	6
II. FACTUAL CONTENT OF MONUMENT	9
III. THE TEN COMMANDMENTS DISPLAY DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE	10
A. THE TEN COMMANDMENTS ARE PART OF SECULAR HISTORY	11
B. TEN COMMANDMENT DISPLAYS, IN THE PROPER CONTEXT AS PRESENT IN THIS CASE, ARE CONSTITUTIONAL	12
C. THIS MONUMENT DOES NOT ENDORSE RELIGION	14
IV. GOVERNMENT SHOULD BE NEUTRAL TOWARD RELIGION, NOT CENSOR RELIGION	18
CONCLUSION	24

TABLE OF AUTHORITIES

Page

CASES:

American Civil Liberties Union of Ohio v. Capitol Square Review and Advisory Board, 243 F.3d 289 (6th Cir. 2001) 14

Anderson v. Salt Lake City Corporation, 475 F.2d 29 (10th Cir. 1973), *cert. denied*, 414 U.S. 879 (1973) 13

Board of Education of Westside Com. Schools v. Mergens, 496 U.S. 226 (1990) 20, 22, 23

Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753 (1995) 16

Chaudhuri v. State of Tennessee, 130 F.3d 232 (6th Cir. 1997), *cert. denied*, 523 U.S. 1024 (1998) 15

City of Elkhart v. Books, 532 U.S. 1058 (2001) 15

County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989) 11, 17, 19, 20

Engel v. Vitale, 370 U.S. 421 (1962) 18

Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993) 20

Lemon v. Kurtzman, 403 U.S. 602 (1971) 14, 15, 16

Lynch v. Donnelly, 465 U.S. 668 (1984) 11, 15, 21

Marsh v. Chambers, 463 U.S. 783 (1983) 19

McGowan v. Maryland, 366 U.S. 420 (1961) 11

School District of Abington Township, Pennsylvania v. Schempp, 374 U.S. 203 (1963) 18

State v. Freedom from Religion Foundation, 898 P.2d 1013 (Colo. 1995), *cert. denied*, 516 U.S. 1111 (1996) 13, 14

TABLE OF AUTHORITIES – Continued

Page

State of Colorado v. Freedom from Religion Foundation, Inc., 898 P.2d 1013 (Colo. 1995) 7, 18

Stone v. Graham, 449 U.S. 39 (1980) 11, 12, 13

Suhre v. Haywood Cty., 55 F. Supp.2d 384 (W.D.N.C. 1999) 14

Widmar v. Vincent, 454 U.S. 263 (1981) 20

Zorach v. Clauson, 343 U.S. 306 (1952) 18

OTHER AUTHORITIES:

Harold Berman, *Individualistic and Communitarian Theories of Justice: An Historical Approach*, 21 U. Cal. Davis L. Rev. 549 (1988) 12

Sir William Blackstone, *Blackstone's Commentaries*, Book 1, Section 2 12

Sir William Blackstone, *Blackstone's Commentaries*, Book 1, Section 3 12

Tex. S. Con. Res. 16, 57th Leg. R.S., 1961 Tex. Gen. Laws 1195 15

INTEREST OF *AMICUS CURIAE*[1]

The monument being challenged in this case was donated by the Fraternal Order of Eagles. The Interest of *Amicus Curiae*, which is thus more fully developed than a normal *Amicus*, is provided below.

On February 6, 1898, the Fraternal Order of Eagles was founded by six theater owners sitting in a pile of lumber in Moran's shipyard in Seattle, Washington. Competitors in the theater industry, they met to discuss a musician's strike. After deciding what to do on that issue, they decided to resolve their differences and form an organization dubbed the "Seattle Order of Good Things," a few weeks later renamed the Fraternal Order of Eagles. The Order asked its members to "make human life more desirable by lessening its ills and promoting peace, prosperity, gladness and hope." Members received free medical attention (as did the individual's family), weekly payments in case of sickness, and a funeral benefit – all valuable services before the widespread availability of medical, disability, and life insurance.

The first meetings were held on the stages of various local theaters, and after the business was settled, a keg of beer was rolled out and all enjoyed a few hours of social activities. Most of the first Eagle members were connected with the theatre – actors, stagehands, directors and playwrights. As some of these members went on tour, they carried the story of the new order with them across the

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[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to this Court's Rule 37.6, none of the counsel for the parties authored this brief in whole or in part and no one other than *amicus* or its counsel contributed money or services to the preparation and submission of this brief.

United States and Canada, leading to a rapid growth in membership across the country. The first Lodges or Aeries sprung up in metropolitan areas such as New York and Philadelphia where theatre and the arts had widespread cultural appeal. The mission of the Fraternal Order of Eagles reads, "The Fraternal Order of Eagles, an international non-profit organization, unites fraternally in the spirit of liberty, truth, justice, and equality, to make human life more desirable by lessening its ills, and by promoting peace, prosperity, gladness and hope."

Over the years, the Eagles have fought and won many battles, including hard fought battles for a Workman's Compensation Act, Mothers and Old Age pensions, Social Security laws and "Jobs After 40." The Eagles continue to fight to liberalize present social benefits along with combating vicious diseases plaguing mankind through their sponsorship of the Art Ehrmann Cancer Fund, Max Baer Heart Fund, Robert Hansen Diabetes Fund, Jimmy Durante Children's Fund, "Doc" Dunlap Kidney Fund and the Lew Reed Spinal Cord Injury Fund.

The Eagles hold sacred four pens that have been the instruments of the betterment of mankind. The first pen was presented in 1923 by Montana Governor Joseph M. Dixon after he signed America's first old age pension into law. The Eagles advocated the need for social security well before the Great Depression and well before anyone else perceived the danger of the government not assisting the elderly and those in need. At the time Governor Dixon signed, he said "you Eagles have planted this seed, if the Eagles of the United States never do anything else, they have more than justified their existence in their advocacy of this great humanitarian movement."

The second pen was presented to the Fraternal Order of Eagles by President Franklin D. Roosevelt in 1935 after he signed the Social Security Act. At the time he said, "The pen I am presenting the order is a symbol of my approval of the fraternity's vision and courage, may its possession inspire your members to dedicate their efforts and those of the fraternity to bring a greater degree of happiness to our people."

The third pen was presented to the Fraternal Order of Eagles in 1964 by President Lyndon B. Johnson after he signed the Medicare amendment to the Social Security Act into law. At the time he said "for your energetic and dedicated espousal of social justice, and for the generous support you have given to all measures designed to further economic opportunity and the compassionate treatment of the sick and disabled."

The fourth pen was also presented to the Fraternal Order of Eagles by President Lyndon B. Johnson in 1965 after he signed the federal "Jobs After 40" bill that outlawed upper age limits in hiring. At the time he said, "The Eagles started this whole idea. That is why I invited the Eagles to be at this private bill signing, and the reason I am presenting this pen to the Fraternal Order of Eagles."

It has been the Eagles long standing advocacy for social justice that has attracted many great social and political leaders to join as members of the organization. Such members include: President Franklin D. Roosevelt, President Harry S. Truman, President Warren G. Harding, President John F. Kennedy, President Ronald Reagan, President Jimmy Carter, entertainer Bob Hope, singer Billy Ray Cyrus, movie director Cecil B. DeMille, actor Yul Brynner, Olympic legend Jim Thorpe, Wisconsin Governor

Bob La Follette (one of the most significant leaders of American progressivism, championing the rights of the poor, workers, women and minorities), entertainer Danny Thomas, actor and heavyweight boxing champion Max Baer, heavyweight boxing champion Joe Louis, heavyweight boxing champion Jack Dempsey, and baseball hall of famers Joe DiMaggio, Honus Wagner, Bob Feller and Cy Young.

As preserved in the minutes of the 1954 Grand Aerie Convention Proceedings, the Youth Guidance Committee of the Fraternal Order of Eagles determined that there existed a problem across the country concerning juvenile delinquency and juvenile crime. The Eagles sought to inspire the youth to put their efforts toward the common good just as the former generations had championed social security and social justice for the common man. The Eagles sought to remedy this situation through a social awareness campaign.

It was proposed that the Eagles engage in a program to highlight the ten commandments as the foundation of law in our culture and thus could serve as a nice shorthand of rules to govern personal conduct that would lead to a productive life. The Eagles donated thousands of monuments bearing the ten commandments across the nation to do its part to battle the ills of juvenile delinquency and crime. The ten commandments version used was a compilation produced by a group of Jewish, protestant and Catholic leaders. The goal of the ten commandments project was to acknowledge the ten commandments' historical impact on the development of Western legal tradition and, through reminding the public of this historical fact, inspiring the youth to live law-abiding and productive lives. The Eagles seek to preserve these

monuments to continue its battle to achieve social justice in this nation through the awareness that only by serving others above oneself can anyone achieve a full and complete life.

SUMMARY OF THE ARGUMENT

The Fraternal Order of Eagles is a social justice organization that has dedicated itself to the establishment of social safety nets such as Social Security and Medicare, helping to find the cure for diseases that plague mankind and develop within the American youth a sense of selfless service for the community. The ten commandments monument at issue in this case is a part of an effort by the Eagles to educate the youth about an historical root of American law and a basic foundation of living life in service of others above self. The context of this particular monument is especially appealing to this purpose because it sits in an area of the capitol grounds that feels like a virtual museum with various other plaques and monuments, some bearing religious inscriptions and imagery.

The ten commandments are part of the secular history of our nation. They are a reflection of an historical root of American law and indeed serve as a reminder that our law is not a modern invention but rather a distant descendant from an earlier time when laws based on universally accepted standards of behavior first began.

Our constitutional jurisprudence does not require us to erase the religious content from our historical monuments. Such a brooding hostility is not the law. The intentional exclusion of religion from the public square does not send a neutral message. Instead, such intentional exclusion

sends a harmful message to the public that it is improper for us to publicly acknowledge any parts of our history and culture with religious content. A state should be free to acknowledge all of its history. The Establishment Clause was never intended to be used to censor our religious history and culture. The Fraternal Order of Eagles simply seeks to preserve our cultural and legal heritage for future generations to grow in their respect for the law and for each other.

ARGUMENT

I. INTRODUCTION

The monument in question was donated in 1961 to the state by the Fraternal Order of the Eagles, a non-religious civic organization founded in 1898 as "The Fraternity for the Common Man." The monument contains the ten commandments as well as the Chi Rho, a symbol of Christianity, the Star of David, a symbol of Judaism, the all-seeing eye, a secular symbol, as well as decorative symbols of no religious significance. The monument also bears an eagle gripping an American flag, demonstrating the Fraternal Order of Eagles and the Order's acknowledgement of its duty to the people of this nation to promote justice and equality. Although the monument includes religious content, the State of Texas is not promoting religion or a particular religion. In fact, it was not the desire of the Fraternal Order of Eagles to promote any particular religious thought at all. The Eagles simply desired to reflect the historical roots of certain behavioral standards that are recognizable and part of the foundation of our culture to encourage the youth to lead more socially productive lives.

Petitioner spends five pages explaining to the Court the different versions of the ten commandments, including making an obvious factual error. Petitioner states on page thirteen of his brief, "[w]hat Texas has placed on its capitol grounds is a version of the Ten Commandments accepted by certain Protestant denominations, but rejected by other Christians as well as Jews." This statement ignores the true origin of the version of the ten commandments provided by the Fraternal Order of Eagles.

The Eagles, recognizing that various faith groups have differing versions of the ten commandments, brought many faith groups together to formulate a universally acceptable version of the ten commandments.[2] The Eagles felt comfortable using such a version, because the Eagles never intended to convey a religious message, as such is not consistent with the mission of the organization. Instead, the Eagles simply sought a message that would serve as a reminder of the historical roots of our legal system and encourage the youth to adhere to basic principles of civility, honor their elders, not be motivated by the greed that can so often take hold of a person in a free market economy such as ours, and lead more productive lives.

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[2] "Initially the Eagles rejected the notion of sponsoring the National Youth Guidance Program (erecting ten commandments monuments) because it was felt that such distribution 'might seem coercive or sectarian.' However, after representatives of the Jewish, Protestant, and Catholic faiths were able to develop a version of the Ten Commandments which was not identified with any particular religious group, the Eagles agreed to support such a youth guidance program."

State of Colorado v. Freedom From Religion Foundation, Inc., 898 P.2d 1013, 1017 (Colo. 1995).

The monument does include religious content. However, there is a vast difference between government sponsorship of religion and recognition of religion or religious facts. We do not ban Renaissance paintings from the National Museum of Art because they have religious content. Neither do we ban Handel's *Messiah* from being played in our city symphony halls.

All monuments on the Texas capitol grounds are legitimate representations of Texas or United States history. Neutral accommodation requires acceptance of that which is representative of state or national history, even if it has religious content. It requires recognition of religious content *along with* other ideas and expression. The acknowledgment of religious content is not the same as endorsement of religion. Acknowledgement is neutral. The refusal to acknowledge religion along with other ideas or expressions is hostility to religion and censorship.

If mere government recognition of religious content or a particular religious perspective on secular thought is a violation of the Establishment Clause as Van Orden alleges, then we are faced with an imposed censorship which treats religion and religious expression differently from other types of ideas and expressions. If the state totally isolates itself from any perceived connection with religion, but recognizes all similar and competing ideas, then the result will be hostility toward religion and state control of ideas – a situation which the First Amendment was designed to prevent. The Eagles seek simply to ensure that their expression of a desire for the youth to follow a set of moral principles and serve others for the betterment of mankind receives the same protection as the propagation of other secular ideas and goals, even though the monument includes religious content.

II. FACTUAL CONTEXT OF MONUMENT

The Texas Capitol Grounds are a square area of land bordered by the following four streets: 15th, San Jacinto, 11th, and Colorado. All the land contained within the four streets makes up the Capitol Grounds (the "grounds"). The grounds contain seventeen (17) monuments as well as numerous plaques, dedications, seals, etc. The grounds contain ten (10) buildings including the Capitol Building and the Supreme Court Building. The monument in question is located in a small park-like subsection of the grounds between the Supreme Court Building and the Capitol Building. The monument is 123 feet from the Supreme Court Building and seventy-nine and one-half (79.5) feet from the Capitol Building. There are four (4) other monuments in this small park-like subsection of the grounds. These monuments are labeled "Tribute to Texas Children," "Texas Pioneer Women," "Statue of Liberty Replica," and "Pearl Harbor Veterans" by a pamphlet published by the State Preservation Board. The monument is 121 feet from the "Tribute to Texas Children" monument, 131.5 feet from the "Texas Pioneer Women" monument, 162.5 feet from the "Statue of Liberty Replica," and 244 feet from the "Pearl Harbor Veterans" monument.

Overlooking this area of land from atop the Capitol Building is the "Goddess of Liberty" statue. A wide spectrum of groups ranging from Wicca to illuminati religious perspectives adhere to the notion that she has qualities of divinity. Also facing the grounds from the Capitol is the seal of Mexico, an eagle holding a serpent in its mouth. This symbol, like the Goddess of Liberty and the ten commandments, also has religious roots. The seal represents Aztec prophecy which Mexican folklore claims compelled the natives to build Mexico City in the middle of a lake. In viewing distance of the ten commandments

monument, a display with religious and secular roots, are four secular monuments and two additional secular displays with religious (though not Judeo-Christian) and secular roots.

Within the Capitol Building, approximately 80 feet from the monument, an array of monuments, plaques, dedications, inscriptions, and seals can be found depicting both the secular and religious roots of Texas history. Among the secular displays in the rotunda are a Tribute to African American Legislators, a confederate plaque, a War with Mexico plaque, and a plaque commemorating those who donated the granite for the building. The entire Texas State Capitol has been designated a National Historic Landmark and visitors to the Capitol are informed of this by a large plaque in the rotunda. Among the displays with religious roots or references is the Six Flags over Texas display in the floor of the rotunda. This display contains the Mexican eagle and serpent, a symbol of Aztec prophecy, as well as the confederate seal containing the words "Deo Vindice" which translate, "God will Judge." It should also be noted that the historic Supreme Court room in the Capitol Building contains the following inscription on the bench, "*Sicut Patribus, Sit Deus Nobis*," which translates, "As God was to our fathers, may He also be to us." Texas does not treat religious thoughts and content as subversive, but, as it should, treats religious and secular thoughts equally, recognizing the importance of both in the history of Texas and this country.

III. THE TEN COMMANDMENTS DISPLAY DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

While the Fraternal Order of Eagles is a secular social justice organization, it desires to protect the monuments it

donated across the nation because these monuments, while they include religious content, serve the secular purpose of the Eagles to encourage the youth to turn from delinquency and embrace a larger mission to serve others. It is difficult to find a suitable message to convey the message to families across the nation that there are basic behavioral standards that historically have formed the root of all other laws and standards. The Eagles felt that the ten commandments best conveyed that message from an historical perspective. Recognition of a religious and historical root of American law does not violate the Establishment Clause.

A. The Ten Commandments are Part of Secular History

On at least four occasions, members of the Supreme Court of the United States have expressly recognized the secular significance of the ten commandments. *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 652-53 (1989) (Stevens, J., with whom Brennan, J., and Marshall, J., concurring in part, dissenting in part) (carving of Moses with ten commandments on wall of Supreme Court's courtroom alongside famous secular lawgivers is a fitting message for a courtroom); *Lynch v. Donnelly*, 465 U.S. 668, 677 (1984) (Burger, C. J., noting with approval the presence of depiction of Moses and ten commandments on Supreme Court's wall); *McGowan v. Maryland*, 366 U.S. 420 (1961) (Frankfurter, J., "Innumerable civil regulations enforce conduct which harmonizes with religious concerns. State prohibition of murder, theft, and adultery reinforce commands of the decalogue."); *Stone v. Graham*, 449 U.S. 39, 45 (1980) (Rehnquist, J. dissenting) (the ten commandments, undeniably, "have had a significant impact on the development of secular legal codes of the Western World.")

This secular significance of the ten commandments, and their role in the foundation of our legal system is undeniable. Sir William Blackstone, the preeminent legal educator of the Framers of the Constitution, wrote that all human laws depend upon two foundations: the law of nature and the law of revelation; the doctrines of which "are to be found only in the holy scriptures." Blackstone's Commentaries, Book I, Section 2. Blackstone, in turn, identifies the English King Alfred as the founder of English common law. *Id.*, Book I, Section 3. The laws of King Alfred start with the ten commandments. Harold J. Berman, *Individualistic and Communitarian Theories of Justice: An Historical Approach,* 21 U. Cal. Davis L. Rev. 549-575 (1988). Whether one agrees with this philosophy or not, it is an undeniable part of our history and the development of our system of law.

The ten commandments are thus far from being a mere religious text sacred to certain religious groups. Their place in the history of our legal system renders them a powerful symbol of the rule of law. Van Orden's discomfort with the undeniable facts of history are not a proper basis for censoring parts of our history.

B. Ten Commandment displays, in the proper context as present in this case, are constitutional.

In *Stone v. Graham*, while striking down a Kentucky statute mandating the display of the ten commandments in every public school classroom, the Supreme Court indicated that the constitutional infirmaries of the Kentucky practice would disappear if "the ten commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of

history, civilization, ethics, comparative religion, or the like." 449 U.S. at 42. Thus, the Court approved the use of the ten commandments, plainly religious provisions included, as a part of a course of study in schools. *Id.*

Numerous courts addressing the constitutionality of government displays of the ten commandments have upheld the displays. For example, the United States Court of Appeals for the Tenth Circuit, in *Anderson v. Salt Lake City Corporation*, 475 F.2d 29 (10th Cir. 1973), *cert. denied*, 414 U.S. 879 (1973), rejected an Establishment Clause challenge to an illuminated, permanent display of a monument depicting the ten commandments on the grounds of a courthouse. The court held that the monument was merely a "depiction of a historically important monument with both secular and sectarian effects," presented primarily for its historical significance. *Id.* at 34. The court concluded that it would be unreasonable "to require removal of a passive monument, involving no compulsion, because its accepted precepts, as a foundation for law, reflect the religious nature of an ancient era." *Id.* at 34.

Similarly, in *State v. Freedom from Religion Foundation*, 898 P.2d 1013 (Colo. 1995), *cert. denied*, 516 U.S. 1111 (1996), the Colorado Supreme Court upheld the display of a ten commandments monument on the grounds of the State Capitol. The monument in the Colorado case is situated in an outdoor park in Denver, among a number of other monuments and tributes commemorating various historical events, characters, and concepts. *Id.* at 1015-16. Concluding that the display was appropriately included in such a forum, the court reiterated the secular significance of the ten commandments:

> All the experts who testified at trial agreed that, at least to the extent that the Commandments established ethical or moral principles, they were expressions of universal standards of behavior common to all western societies. It was agreed that these moral standards, as influenced by the Judeo-Christian tradition, have played a large role in the development of the common law and have formed a part of the moral background for the adoption of the national constitution.

Id. at 1024. The court held that the display "fits within the mélange of historical commemorative accounts found in Lincoln Park." *Id.* Moreover, "the display of monuments in Lincoln Park teaches a history of rich cultural diversity – due to our past it would be inaccurate to ignore a history that includes religion." *Id.* at 1025.

In addition, *Suhre v. Haywood Cty.*, 55 F. Supp.2d 384 (W.D.N.C. 1999) upheld a ten commandments display. In *Suhre*, the passive display of the ten commandments in a county courtroom next to a substantially larger sculpture of Lady Justice did not violate the Establishment Clause because the display as a whole did not convey a religious message. *Suhre*, 55 F. Supp.2d at 399.

C. The monument does not endorse religion

The Supreme Court has sent conflicting signals about whether the well-known *Lemon* test should be applied in cases of this nature. *American Civil Liberties Union of Ohio v. Capitol Square Review and Advisory Board*, 243 F.3d 289, 305-6 (6th Cir. 2001) (en banc). See *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Assuming *Lemon* remains the appropriate test, it is clear that the State Capitol's collection of monuments, including the display of the ten

commandments, pass the constitutional requirements of the Establishment Clause.

Under *Lemon*, the State's action must have a secular purpose. *Lemon*, 403 U.S. at 612-13. The Supreme Court, in determining whether a secular purpose exists, has simply required that the display not be "motivated wholly by religious considerations." *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984). The fact that a monument conveys some religious meaning does not cast doubt on the existence of valid secular purposes for its display. *City of Elkhart v. Books*, 532 U.S. 1058, 1063 (2001) (Rehnquist, J., dissenting)

As noted by the District Court in this case, "the best evidence of the State's purpose is found in Senate Concurrent Resolution Number 16, the legislative act which permitted the Fraternal Order of Eagles to place the ten commandments on the Capitol grounds." (R. 329) Memorandum Opinion and Order 10/02/02, p. 9. The resolution plainly states that the monolith was "presented by the Eagles to promote youth morality and to help stop the alarming increase in delinquency." Tex. S. Con. Res. 16, 57th Leg., R.S., 1961 Tex. Gen. Laws 1195; Jt. Ex. 1. Van Orden stipulated that the "promotion of morality is a valid secular purpose." Pltf's Ex. 67, No. 4. Given the stipulation and the plain intent of the legislature as expressed in the resolution, the inquiry as to whether this prong of the *Lemon* test is met need go no further.

"Unless it seems to be a sham, . . . the government's assertion of a legitimate secular purpose is entitled to deference." *Chaudhuri v. State of Tennessee,* 130 F.3d 232, 236 (6th Cir. 1997), *cert. denied*, 523 U.S. 1024 (1998). Both the legislature's stated purpose and the stated

purpose of the Fraternal Order of Eagles regarding this project are clear that the monument was erected for the secular purpose of encouraging the youth to turn from delinquency and to promote youth morality.

The second prong of the *Lemon* test is whether the primary effect of the government's action either advances or inhibits religion. *Lemon*, 403 U.S. at 612-13. The effect prong has been further refined by Justice O'Connor's "endorsement test" as illuminated in the Court's opinion in *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 778-780 (1995) (O'Connor, J., concurring). According to Justice O'Connor, endorsement *vel non* is to be judged by a "reasonable observer" standard. This reasonable observer is "deemed aware of the history and context of the community and forum in which the religious display appears," *Id.* at 780. While "there is always someone who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion," that "someone" does not personify the community ideal with which we are concerned in applying the endorsement test. *Id.*

Applying this prong of the *Lemon*-plus-endorsement test, it is clear that no reasonable observer of the Capitol's collection of monuments would perceive their primary effect as being one of endorsing religion in general or one religion in particular. Rather, a reasonable observer would see a collection of historical monuments tied together by a common theme – Texas history and the people of Texas. This monument's size and location affords no more importance or prominence than other monuments. To the contrary, the District Court noted that "The ten commandments monument is located . . . well off the usual beaten path for tourists. Indeed, but for the publicity

generated by the present litigation, most visitors to the State Capitol and most residents of the State of Texas would have been unaware of the ten commandments monument." (R. 333) Memorandum Opinion and Order 10/02/02, p. 13. The fact that one of the many monuments on the Capitol grounds has religious connections, origins or connotations in addition to their secular significance would not lead a reasonable observer to conclude that the government is endorsing religion.

The effect prong requires a "reasonable" observer, not a hyper-sensitive objector who is offended by the mere presence of the ten commandments anywhere on the capitol grounds. By the standards of the latter, all government displays of objects with any religious connections are unconstitutional. Would Van Orden have us sand the words off the bench of the original Texas Supreme Court, take the Goddess of Liberty off the Capitol Building, rewrite the Confederate motto and redraw the Mexican flag? Should "In God We Trust" be removed from our money, or "God" be erased from our Declaration of Independence? These are all government displays of objects with religious content that would, by Van Orden's standards, be unconstitutional.

Van Orden attacks the monument solely because it contains religious content. Such a view fails to focus on the context in which the monument is placed, which is the key inquiry in determining the question of endorsement. See *County of Allegheny v. ACLU*, 492 U.S. 573, 597 (1989). As the District Court properly noted, "Viewed in the proper context, and in light of its history this passive monument cannot be said to advance, endorse, or promote religion to a degree that would require the drastic remedy of ordering the Defendants to remove it from the Capitol grounds."

(R. 333-34) Memorandum Opinion and Order 10/02/02, p. 13-14. The Supreme Court of Colorado considered this issue in *State of Colorado v. Freedom From Religion Foundation, Inc.*, 898 P.2d 1013 (Colo. 1995), and upheld the display the of a ten commandments monument on the grounds of the State Capitol. One monument among many, the ten commandments monument does not violate the Establishment Clause.[3] Accordingly, the opinion of the Fifth Circuit Court of Appeals and the District Court dismissing Van Orden's claims should be affirmed.

IV. GOVERNMENT SHOULD BE NEUTRAL TOWARD RELIGION, NOT CENSOR RELIGION

In the difficult area of church/state relations, the Supreme Court has reached for the goal of neutrality toward religion and among religions. Neutrality with regard to religion was first discussed in *School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203 (1963). Neutrality meant that the state could neither advance nor inhibit religion. *Id.* at 226.

Often neutrality toward religion is like standing on a sandbar and waiting for high tide. Any possible neutral ground slips away and someone is offended because their perceived idea of neutrality is violated. Mankind cannot be separated from religion. "The history of man is inseparable from the history of religion." *Engel v. Vitale*, 370 U.S. 421, 434 (1962). "We are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S.

[3] The parties agree that the third prong of the *Lemon* test "entanglement" is not in issue. (R. 329) Memorandum Opinion and Order 10/02/02, p. 9.

306, 313 (1952). Just as there is no way to isolate the religious part of a person from the rest of the person, there is no sieve into which ideas can be placed to sift the religious aspects of ideas from the secular.

In an attempt to grasp the meaning of the Establishment Clause and the government's role with respect to religion, the Supreme Court has attempted to discern the intentions of the authors of the First Amendment. "[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied . . . " *Marsh v. Chambers*, 463 U.S. 783, 790 (1983).

Though people can draw different views from history, it is rather obvious that most of the Founding Fathers believed the United States to be a nation founded on religious expression. If analyzed by today's standards, many government actions early in our nation's history did in fact promote or endorse religion in general. See, *e.g.*, *County of Allegheny*, 492 U.S. at 670-673 (1989) (Kennedy, J., concurring in part and dissenting in part). Surely these men who drafted and adopted the First Amendment and who treasured the rights protected thereby as much as we do today would not take actions to violate the very rights that they had worked so hard to define and protect.

Though neutrality is often difficult to ascertain in the church/state context, the Supreme Court has established a middle ground, in the area of equal access. The concept of equal access prohibits discrimination against religious groups if a public facility is available for use by different groups or organizations. If an open forum is created by a state-operated facility, then religious groups must be allowed to use the facility the same as other groups. The

Supreme Court has repeatedly held that the use of public school facilities by religious groups does not create government support of religion if such use is on the same terms as other groups; rather, the neutral position is accommodation of religious groups along with other groups. *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993); *Board of Education of Westside Com. Schools v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981). Such a policy does not advance religion; instead it serves a neutral purpose. *Widmar*, 454 U.S. at 267. The exclusion of religious groups is religious content-based discrimination and unconstitutional. *Id.* at 276.

Similarly, the monuments of the Capitol grounds are an attempt by a state to express its culture and heritage. Neutrality requires that religious ideas or symbols be permitted along with historical, economic, commercial, or philosophical references. The exclusion of only religious symbols amounts to content-based discrimination and hostility to religious citizens and heritage.

A society functions best when there is free exchange of ideas. The First Amendment makes the free exchange of ideas possible. But today there is a philosophy that certain ideas are not entitled to public debate or expressions because they are religious. This philosophy has nothing to do with the Establishment Clause, but its purpose is the censorship of religious ideas which do not meet the approval of those adhering to the philosophy. As Justice Kennedy stated in *County of Allegheny*, 492 U.S. at 664 (Kennedy, J., concurring in part and dissenting in part), "Judicial invalidation of government's attempt to recognize the religious underpinnings of the holiday would signal

not a neutrality but a pervasive intent to insulate government from all things religious."

The Establishment Clause was enacted to promote the good, religious freedom, and to prohibit the bad, the state attempt to control the minds of its citizens through regulation of religious beliefs and practices. The systematic weeding out of religious ideas and expressions from public life is the very opposite of the purpose of the Establishment Clause. The Establishment Clause was designed to protect the free exercise of religion, not remove it from the public realm.

> Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. Anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause. Indeed, we have observed, such hostility would bring us into 'war with our national tradition as embodied in the First Amendment's guarantee of the free exercise of religion.'

Lynch, 465 U.S. at 673 (internal citations omitted).

Mandatory accommodation permits a monument with religious content. The forced removal of the monument would declare that religious expression is a second class form of speech, not entitled to public recognition or constitutional protection. Forced removal would be an example of the "war with our national tradition" and the tradition and heritage of the State of Texas that the Court condemned.

Four decades ago, the State of Texas chose to acknowledge the ten commandments' role in our legal heritage along with the economic, industrial, and social aspects of our heritage. Now, one plaintiff seeks to impose his will on the entire state by forbidding the residents of Texas to recognize a portion of their heritage because of its religious content. The Establishment Clause is not a weapon to eradicate from the public realm any ideas that one disagrees with by labeling them "religious." It is not an instrument to be used to rewrite history.

> These men knew that the First Amendment, which tried to put an end to governmental control of religion and of prayer, was not written to destroy either. They knew rather that it was written to quiet well-justified fears which nearly all of them felt arising out of an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted to speak . . .

Engel, 370 U.S. at 435.

Van Orden is as free as any resident of Texas to worship or not worship as he pleases. He may ignore the monument if he wishes. It does not exercise any control over him. There are no shackles on his religious expression.

But a shackle will appear if this court decides to prohibit a state from recognizing its religious roots. A society is not free when the state promotes secular ideas and expressions, but squelches religious ideas and expressions. A nation is not free when the state or the court decides to dictate which ideas and symbols must be censored in reflecting history. As Justice O'Connor wrote for the plurality in *Mergens*:

> [t]he Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.

496 U.S. at 248 (internal quotation marks and citation omitted).

The Fraternal Order of Eagles never intended to spark a legal battle in 1961, much less one over religion. The Eagles merely sought to encourage young people by pointing to the historical basis for our rule of law and encouraging them to be law-abiding citizens and to know that only by serving others above oneself can anyone achieve a full and complete life. This is not a violation of the Constitution. It is a generous act of good citizenship.

The Eagles beseech this Court to uphold the Court of Appeals below and not issue a ruling which would adversely affect thousands of monuments donated by the Eagles in cities and communities nationwide.

CONCLUSION

For the foregoing reasons, the Fraternal Order of Eagles respectfully requests the Court to affirm the opinion of the Court of Appeals and the order of the District Court dismissing Van Orden's claims in their entirety.

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